BEFORE THE SECRETARY OF STATE
STATE OF COLORADO

CASE NO. OS 20080026

AGENCY DECISION

IN THE MATTER OF THE COMPLAINT FILED BY LENNARD SIMPSON REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY COLORADO LEAGUE OF TAXPAYERS

On August 7, 2008, Complainant Lennard Simpson filed a complaint with the Colorado Secretary of State against Colorado League of Taxpayers ("League" or "Respondent"), alleging violations of Article XXVIII, Sections 6(1), 6(2), and (7) of the Colorado Constitution as well as Sections 1-45-108(1) and (2) and 1-45-109 of the Fair Campaign Practices Act, Sections 1-45-101 *et seq.*, and Rules 4 and 9 of the Secretary of State's Rules Concerning Campaign and Political Finance, 8 CCR 1505-6 (CPF Rules). The Secretary of State transmitted the complaint to the Colorado Office of Administrative Courts on August 8, 2008, for the purpose of conducting a hearing pursuant to Article XXVIII, Section 9(2)(a) of the Colorado Constitution.

Hearing was held in this matter September 3, 2008. The hearing was digitally recorded in Courtroom 2. Simpson participated personally and was represented by Adele L. Reester, Esq. of Bernard, Lyons, Gaddis and Kahn. The League was represented by Scott Shires, a non-attorney representative, pursuant to Section 13-1-127(2), C.R.S. (2008). The Administrative Law Judge (ALJ) issues this Agency Decision pursuant to Colo. Const., Art. XXVIII, Section 9(2)(a) and Section 24-4-105(14)(a), C.R.S. (2008).

ISSUE PRESENTED

Mike Freeman was a Republican candidate for County Commissioner At Large in Weld County, Colorado in the August 12, 2008 primary election. Shortly before that election, the Colorado League of Taxpayers mailed a flyer to various residents of Weld County, Colorado detailing and negatively commenting on Freeman's past support for Referendum C, characterized in the flyer as a $6 billion tax increase. The issues to be determined are: 1) whether the League, in connection with that flyer, made an electioneering communication in excess of one thousand dollars in a calendar year without submitting required reports, in violation of Article XXVIII, Section 6(1) of the Colorado Constitution, Section 1-45-108(2), C.R.S., and CPF Rule 9; 2) whether the League, a corporation, provided funding for an electioneering communication in

connection with that flyer, without establishing a political committee or small donor committee for the purpose of providing such funding, in violation of in violation of Article XXVIII, Section 6(2) of the Colorado Constitution; and 3) whether the League is a political committee as defined in Article XXVIII, Section 2(12)(a) of the Colorado Constitution but nevertheless failed to report expenditures in violation of the requirements of Sections 1-45-108(1) (as extended by Article XXVIII, Section 7) and 1-45-109(2) and CPF Rule 4?

FINDINGS OF FACT

1. Lennard Simpson ("Simpson" or "Complainant") is a resident of Alt, Colorado, in Weld County, Colorado. He was eligible to vote in the Republican primary election held on August 12, 2008 for Weld County Commissioner At Large.

2. Mike Freeman was a Republican candidate for Weld County Commissioner At Large in the August 12, 2008 primary election.

3. The League is a non-profit corporation in good standing registered with the Colorado Secretary of State.

4. On or about July 23, 2008, the League directly mailed a flyer to personal residences in Weld County, Colorado. The communication, which was a 5.5" x 11" glossy, multi-color, self-mailer, was received by Simpson and other citizens of Weld County shortly after July 23, 2008 and with 30 days of the August 12, 2008 primary.

5. The flyer unambiguously referred to Mike Freeman and to no other individuals. One side of the flyer listed Mike Freeman's name and stated: "His support of a $6 billion tax increase is making taxpayers howl!" The reverse side of the flyer included the following text: "Mike Freeman—United With Big-Government Liberals To Raise Your Taxes. Mike Freeman publicly supported a $6+billion tax increase [identified in a footnote as "Referendum C Ballot Vote, July 27, 2005"] in Colorado, our state's larges tax increase. . . . .EVER! Weld County Can't Afford Mike Freeman as County Commissioner." This side of the flyer also contained a photograph of Freeman with the word "Taxer" printed in large letters across the bottom half of the photograph. The return address on the flyer indicated "Colorado League of Taxpayers, PO Box 1341, Fort Collins, CO 80521."

6. The flyer thus communicated that the League opposed to Mike Freeman as County Commissioner. However, the flyer did not mention the primary election and did not explicitly exhort voters to vote in favor or against Mike Freeman. The flyer also did not use language such as "vote for/against," "elect," "defeat," "reject," "support [or do not support]," "cast your ballot for/against," or similar language.

7. The flyer was mailed to an audience that included individuals who were eligible to vote, and did vote, in the August 12, 2008 Republican primary election for Weld County Commissioner At Large and were thus members of the electorate for that office.

8. The flyer was mailed within 30 days before the August 12, 2008 primary.

9. The League expended in excess of $1,000 to print and directly mail the flyer in July 2008 for the purpose of communicating its opposition to Mike Freeman in the upcoming primary election for Weld County Commissioner. The expenditure associated with the printing and mailing of the flyer was made in a single calendar year.

10. There is no indication in the record that the League's expenditure for the flyer was controlled by or coordinated with any candidate or agent of such candidate.

11. According to Exhibit B, a summary of the League's articles of incorporation on file with the Secretary of State, the league was registered or formed as a corporation on July 26, 2007.

12. The League is not registered with the Secretary of State as a political committee and does not assert it has established a small donor committee.

13. On August 8, 2008, the League filed with the Secretary of State a completed entitled "Notice of Independent Expenditure in Excess of One Thousand Dollars (Article XXVIII, Sec. 5)," along with an August 8, 2008 letter, both sent by facsimile transmission. The letter stated the report "is filed purposes of settling a complaint which is not contested by the Colorado League of Taxpayers." The letter also noted: "There was never any desire nor any attempt to not provide information that is required to be filed with the Department of State." The letter additionally noted: "We are requesting a waiver of all penalties for this committee." The form was dated August 8, 2008 and was completed by Scott L. Shires. It included the following information supplied by Mr. Shires on behalf of the League:

Information Requested on Form	**Information Provided On Behalf of the League**
Name of Person Responsible for Independent Expenditure	Colorado League of Taxpayers
Full Address of Person Responsible for Independent Expenditure	PO Box 1341 Fort Collins, Colorado 80521
Name of candidate the independent expenditure is intended to support or oppose	Mike Freeman
Was independent expenditure used to	[no response]

support or oppose?	
Name and Address of Vendor/Person Receiving Payment	Spectrum Publishing, 95 Eddy Ave., Suite 101, Manchester, NH 03102
Detailed Description of the Independent Expenditure	5/5" x 11" glossy self mailer detailing Mike Freeman's past support of Referendum C, a $6 billion tax increase
Date Funds Were Obligated	July 21, 2008
Amount of Expenditure	$7,000

14. On July 21, 2008, the League obligated funds in the amount of $7,000 to pay for the Mike Freeman flyer, thereby making payment in excess of $1,000 in a calendar year and within 30 days of the August 12, 2008 primary election in connection with that flyer. The League did not file notice of this payment with the Secretary of State until August 8, 2008.

15. The only League disclosure on file with the Secretary of State as of the date of hearing was the August 8, 2008, Notice of Independent Expenditure in Excess of One Thousand Dollars. As of the hearing date, the League had not filed any electioneering communications report with the Secretary of State or any contribution and expenditure reports as a political committee. The League's August 8, 2008 Independent Expenditure filing does not identify the reported expenditure as an electioneering communication.

16. As of the hearing date, the League had not registered with the Secretary of State as a political committee.

17. The League does not assert that it has filed any contribution and expenditure reports as a political committee with the Clerk and Recorder for Weld County.

18. The deadline to file electioneering communication reports with the Secretary of State with respect to the reporting period July 17 through July 30, 2008 was August 4, 2008.

19. The League mailed flyers to voters in approximately three other elections in prior years. The nature of those flyers was not disclosed in the record.

20. The evidence did not indicate the purpose or purposes for which the League was formed.

21. The evidence did not establish whether the League: 1) was formed for the purpose of promoting political ideas and cannot engage in business activity; 2) has no shareholders or other persons with a claim on its assets or income; or 3) was not

established by or does not accept contributions from business corporations or labor organizations.

22. The evidence did not establish that the League's major purpose is to support or oppose the nomination or election of a candidate or candidates.

23. There is no indication the League intentionally violated any provision of Colorado's campaign finance laws. The evidence did not establish that the League clearly knew or reasonably should have known that its defense in this proceeding or any part thereof was substantially frivolous, substantially groundless or substantially vexatious.

24. Immediately prior to this proceeding, the League was the prevailing party in an administrative proceeding, Case No OS 20080019, before the undersigned Administrative Law Judge (Agency Decision, August 28, 2008). Like the present case, OS 20080019 involved a complaint to the Secretary of State by Complainant Simpson, alleged campaign finance violations by the League in connection with the same flyer and involved a related legal theory.

DISCUSSION

Article XXVIII of the Colorado Constitution, adopted as an initiated measure by the voters of Colorado in 2002, in combination with the Fair Campaign Practices Act, Sections 1-45-101 *et seq.*, together comprise Colorado's campaign finance law. Simpson contends the League violated these provisions as they relate to disclosure of electioneering communications, entities that may provide funds for such communications, and required reporting of contributions and expenditures by political committees. Specifically, Simpson maintains that in connection with the Mike Freeman flyer, the League expended $1,000 or more in a calendar year on electioneering communications as defined in Article XXVIII, Section 2(7) of the Colorado Constitution but failed to file the appropriate electioneering communication report with the Secretary of State, in violation of Article XXVIII, Section 6(1) and CPF Rule 9. Simpson also asserts that in connection with the flyer the League, a corporation, violated Article XXVIII, Section 6(2) by providing funding for an electioneering communication, without establishing a political committee for that purpose. Finally, Simpson asserts that because the League, in connection with the flyer, made expenditures in excess of $200 to support or oppose the nomination or election of a candidate, it is a political committee as defined in Article XXVIII, Section 2(12)(a), but failed to file reports of contributions and expenditures, in violation of Sections 1-45-108(1) (as extended by Article XXVIII,

Section 7) and 11-45-109(2) and CPF Rule 4.[1] Simpson seeks the imposition of penalties for these asserted violations and an award of attorney's fees.

In accordance with Section 9(1)(f) and 9(2)(a) of Article XXVIII of the Colorado Constitution, this proceeding is conducted pursuant to the provisions of Section 24-4-105, C.R.S. of the State Administrative Procedure Act. In such a proceeding, the proponent of the order bears the burden of proof. Section 24-4-105(7), C.R.S. In this case, Simpson is the complaining party and therefore bears the burden of proof to establish the violations Article XXVIII of the Colorado Constitution and the Fair Campaign Practices Act as alleged in his complaint.

I.

Simpson's first assertion is that the League expended $1,000 or more in a calendar year on electioneering communications as defined in Article XXVIII, Section 2(7) of the Colorado Constitution in connection with the Mike Freeman flyer, but failed to file the appropriate electioneering communication report with the Secretary of State, in violation of Article XXVIII, Section 6(1) and CPF Rule 9. For the reasons stated below, the ALJ concludes the flyer constituted an electioneering communication for which the League expended $1,000 or more. Consequently, the League was required to comply with the reporting requirement contained in Colo. Const. Art. XXVIII, Section 6(1), but failed to do so.

A.

Colo. Const. Art. XXVIII, Section 6(1) requires any person who expends one thousand dollars or more per calendar year on electioneering communications to submit reports to the Secretary of State pursuant to the schedule established by Section 1-45-108(2), C.R.S. of the FCPA.[2] With respect to primary elections, Section 1-45-

[1] There is no allegation in this proceeding that the League is a political organization as defined in Section 1-45-103(14.5) or that the League was required to file any disclosures pursuant to Section 1-45-108.5, C.R.S.

[2] Colo. Const. Art. XXVIII, Section 6(1) provides:

> Section 6. Electioneering communications.
>
> (1) Any person who expends one thousand dollars or more per calendar year on electioneering communications shall submit reports to the secretary of state in accordance with the schedule currently set forth in 1-45-108 (2), C.R.S., or any successor section. Such reports shall include spending on such electioneering communications, and the name, and address, of any person that contributes more than two hundred and fifty dollars per year to such person described in this section for an electioneering communication. In the case where the person is a natural person, such reports shall also include the occupation and employer of such natural person. The last such report shall be filed thirty days after the applicable election.
>
> (2) Notwithstanding any section to the contrary, it shall be unlawful for a corporation or

108(2)(a)(I)(B) provides that reports are to be filed with the Secretary of State on the first Monday in July and on each Monday every two weeks thereafter before the primary election.

The evidence established that the League obligated $7,000 to pay for the flyer on July 21, 2008. The League thus spent more than $1,000 in a calendar year in connection with the flyer at issue here. It is also undisputed that the League is a corporation and thus qualifies as a "person" under Colo. Const. Art. XXVIII, Section 6(1), as defined by Colo. Const. Art. XXVIII, Section 2(11).[3] Thus, the League was required to file the required electioneering communication reports with the Secretary of State if its spending for the flyer at issue here constituted conduct covered by Colo. Const. Art. XXVIII, Section 6(1). It is further undisputed that as of the date of hearing the League had not filed any electioneering reports, which would have been due on August 4, 2008 with respect to the expenditures in question.

B.

Subject to exclusions that are not applicable here, an electioneering communication is defined at Colo. Const. Art. XXVIII, Section 2(7)(a) as:

> *[A]ny communication* broadcasted by television or radio, printed in a newspaper or on a billboard, *directly mailed* or delivered by hand to personal residences or otherwise distributed that:
>
> (I) *Unambiguously refers to any candidate*; and
>
> (II) *Is* broadcasted, printed, *mailed*, delivered, or distributed *within thirty days before a primary election* or sixty days before a general election; and
>
> (III) Is broadcasted to, printed in a newspaper distributed to, mailed to, delivered by hand to, or otherwise distributed *to* an audience that includes *members of the electorate* for such public office.

[Emphasis supplied].

Thus, as relevant here, in order to qualify as an electioneering communication, a communication: (a) must be broadcasted, printed, directly mailed, delivered by hand to

---

> labor organization to provide funding for an electioneering communication; except that any political committee or small donor committee established by such corporation or labor organization may provide funding for an electioneering communication.

[3] Pursuant to Art. XXVIII, Section 2(11), a "person" is "any natural person, partnership, committee, association, *corporation*, labor organization, political party, or other organization or group of persons." [Emphasis supplied].

personal residences or otherwise distributed; (b) must unambiguously refer to a candidate; and (c) and must be broadcasted, printed, mailed, delivered or distributed within 30 days of a primary election; (d) to an audience that includes members of the electorate.

The evidence established that in the August 12, 2008 Republican primary Mike Freeman was a candidate for Weld County Commissioner At Large. The League's flyer at issue here explicitly named Mike Freeman (and only Mike Freeman) and thus unambiguously referred to a candidate. Additionally, the evidence established that on or about July 23, 2008, the League directly mailed the flyer to personal residences in Weld County to an audience that included individuals who were eligible to vote, and did vote, in the August 12, 2008 Republican primary election for Weld County Commissioner At Large and were thus members of the electorate for that office. Thus, the flyer in question meets the elements of an electioneering communication expressly established by Colo. Const. Art. XXVIII, Section 2(7)(a).

C.

However, as provided by CPF 9.4, and consistent with U.S. Supreme Court and Colorado appellate precedent, a communication may only be deemed an electioneering communication if an additional limiting element is satisfied. CPF 9.4 provides:

> Pursuant to the decisions of the Colorado Court of Appeals in the case of *Harwood v. Senate Majority Fund, LLC*, 141 P.3d 962 ([Colo. App.] 2006), and of the United States Supreme Court in the case of *FEC v. Wisconsin Right to Life,* 127 S. Ct. 2652 (2007), a communication shall be deemed an electioneering communication *only if it is susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate.* In making this determination, (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into contextual factors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; (4) in a debatable case, the tie is resolved in favor of not deeming a matter to be an electioneering communication.

[Emphasis added].

Thus, pursuant to CPF 9.4, in addition to the elements of electioneering communications as reflected in Colo. Const. Art. XXVIII, Section 2(7)(a), for a communication to be deemed an electioneering communication subject to disclosure requirements under Colorado's campaign finance provisions, there can be no

reasonable interpretation of the communication other than as an appeal to vote for or against a specific candidate. Furthermore, this determination must be based exclusively, or almost exclusively, on the objective elements within the communication itself.

The limitations on the scope of electioneering communications contained in CPF 9.4 reflect an ongoing effort to assure that campaign finance regulation in Colorado does not conflict with First Amendment rights. The purpose of campaign finance laws such as those in Colorado is, in part, to control the potential for corruption and the appearance of corruption that results from large campaign contributions. *See* Colo. Const., Art. XXVIII, Section 1. Colorado's campaign finance provisions attempt to accomplish these goals through contribution limitations, encouraging voluntary campaign spending limits, and imposing reporting and disclosure requirements. However, the courts have also determined that such laws impact, and in some cases conflict with, First Amendment rights. *See, e.g. Buckley v. Valeo,* 424 U.S. 1 (1976). As a result of ongoing concerns regarding the impact of campaign finance laws on First Amendment free speech rights, the courts have limited the coverage of certain aspects of campaign finance laws and have narrowly construed certain terms in those laws in an effort to protect political speech while giving effect, to the extent possible, to the intent and goals of campaign finance legislation. *See League of Women Voters of Colorado v. Davidson,* 23 P.3d 1266 (Colo. App. 2001) (LWV).

Because CPF 9.4 references federal and state cases that have attempted to reconcile campaign finance regulation with First Amendment freedoms, it is instructive to examine those cases and their predecessors as an aid to interpreting and applying the rule.

The Supreme Court's landmark decision in *Buckley v. Valeo* recognized that legislatures have the well-established power to regulate elections and may promulgate standards that govern the financing of political campaigns in order to serve important governmental interests, including the interests of limiting the actuality and appearance of corruption. 424 U.S. at 26. The Court noted, however, that campaign finance restrictions "operate in an area of the most fundamental First Amendment activities," thereby potentially threatening legitimate political expression. *Id.* at 14. *Buckley* therefore recognized the need to limit legislative authority over elections so that First Amendment freedoms will be adequately protected. *Id.* at 14. *See also North Carolina Right to Life v. Leake,* 525 F.3d 274, 281 (4th Cir. 2008). In so doing, and in order to avoid First Amendment-related vagueness and overbreadth problems, *Buckley* narrowly construed certain sections of the Federal Election Campaign Act of 1971 (FECA) to require that a communication "expressly advocate" the election or defeat of a candidate before the statutory provisions could be applied. Additionally, *Buckley* held that express advocacy occurs only when certain specific words are used, such as "vote for," "elect," "support," "cast your ballot for," "vote against," "defeat," and "reject." 424 U.S. at 44 and n. 52. *See also Federal Election Commission v. Massachusetts Citizens for Life,* 479

U.S. 238, 249 (1986) (*MCFL*) (*Buckley* adopted an express advocacy requirement; a finding of express advocacy depends on the communication in question containing language such as "vote for," "elect," and "support"). Thus, up through the decision in *Buckley* the U.S. Supreme Court had determined that a communication constitutes express advocacy only if it contains an exhortation that urges voters to take action and identifies specific candidates. *See Alliance for Colorado's Families v. Gilbert*, 172 P.3d 964, 970 (Colo. App. 2007).

Subsequent to *Buckley* and *MCFL*, the Supreme Court decided *McConnell* v. *Federal Election Commission,* 540 U. S. 93 (2003) and *Federal Election Commission v. Wisconsin Right to Life,* 551 U.S. ___, 127 S. Ct. 2652 (2007), both of which addressed, among other matters, Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA). Section 203 makes it a federal crime for a corporation to use its general treasury funds to pay for any "electioneering communication," 2 U. S. C. §441b(b)(2), which BCRA defines as any broadcast that refers to a candidate for federal office and is aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction where that candidate is running, §434(f)(3)(A). In the context of a First Amendment facial challenge, *McConnell* upheld Section 203 even though (and to the extent that) it regulated both express advocacy promoting a candidate's election or defeat and also the "functional equivalent" of express advocacy. In contrast, *Wisconsin Right to Life* upheld an as-applied First Amendment challenge to regulation under Section 203 with respect advertisements that were determined to be neither express advocacy nor its functional equivalent.

The Supreme Court's analysis in *Wisconsin Right to Life*, specifically referenced in CPF 9.4, further clarified what communications constitute the functional equivalent of express advocacy and are therefore subject to regulation consistent with the First Amendment, in contrast to communications that do not rise to the level of express advocacy or its functional equivalent but instead constitute genuine issue ads and are thus not subject to campaign finance regulation. After considering First Amendment concerns including those regarding vagueness and overbreadth, *Wisconsin Right to Life* rejected tests for determining what constitutes the functional equivalent of express advocacy that would involve analysis of the intent of the communication or its effect on the target audience.[4] For the same reasons, the case also rejected tests that would entail more than minimal, if any, discovery, or that would involve "the open-ended rough-and-tumble of factors." The Court held, instead, that to safeguard the First Amendment liberty "to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment," the proper standard for an as-applied challenge to BCRA § 203 must be "objective, focusing on the substance of the communication rather than amorphous considerations . . . . " 127 S. Ct. at 2666.

[4] In contrast, *McConnell* appeared to focus on an intent and effect test by stating that ads aired during the covered period would constitute the functional equivalent of express advocacy "if the ads are intended to influence the voters' decision and have that effect." 540 U.S. at 206.

The Court therefore determined that "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667.

The Court then applied these standards to a series of similar radio ads that were paid for by Wisconsin Right to Life,[5] and determined that the advertisements were not the functional equivalent of express advocacy. The ads at issue stated that: "Sometimes it's not fair to delay an important decision." and went on to state: "A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve. It's politics at work, causing gridlock and backing up some of out courts to a state of emergency." The ad then asked its audience to "Contact Senators Feingold and Kohl and tell them to oppose the filibuster."

The Supreme Court found that the ads were plainly not the functional equivalent of express advocacy, noting that their content was consistent with that of a genuine issue ad because the ads focused on a legislative issue, took a position on the issue, exhorted the public to adopt that position, and urged the public to contact public officials with respect to the matter. The Court also indicated that the content of the ads lacked indicia of express advocacy in that the ads did not mention an election, candidacy, political party, or challenger, and they did not take a position on a candidate's character, qualifications, or fitness for office. *Id.* at 2667. The Court pointed out that issue ads "convey information and educate" and noted that "[a]n issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decision." *Id.* Noting that "[d]iscussion of issues cannot be suppressed simply because the issues may be pertinent to an election," the Court stated that where the First Amendment is concerned, "the tie goes to the speaker, not the censor." *Id.* at 2669. Finally, the Court concluded that because the ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, the ads were not the functional equivalent of express advocacy. In light of this determination, the Court held that regulation of the ads as provided by §203 of BCRA was not constitutionally permissible.

In addition to the federal courts' consideration of BCRA, the Colorado Court of Appeals has also had occasion to consider regulation of electioneering communications under analogous state law provisions. For example, in *Harwood v. Senate Majority Fund, LLC,* 141 P.3d 962 (Colo. App. 2006), also specifically referenced in CPF 9.4, the Court reiterated, as determined in *McConnell*, that the presence or absence of 'magic words' does not meaningfully distinguish between electioneering and non-electioneering speech.

[5] The Supreme Court described this organization as a "nonprofit, nonstock, ideological advocacy corporation recognized by the Internal Revenue Service as tax exempt under § 501(c)(4) of the Internal Revenue Code."

The Colorado Secretary of State responded to both *Wisconsin Right to Life* and *Harwood* by adopting CPF 9.4, which incorporates the electioneering communication limitations set forth in *Wisconsin Right to Life*. Applying CPF 9.4 to the facts of this case after considering each of the factors discussed in *Wisconsin Right to Life,* the ALJ concludes that the League's flyer is susceptible to no reasonable interpretation other than as an appeal to vote against a specific candidate, in this case Mike Freeman. Consequently, the ad is the functional equivalent of express advocacy and is subject to regulation as an electioneering communication.

In making this determination, the ALJ has solely considered the substance of the flyer and has not considered factors such as the likely intent of the League or the likely effect on the audience. Nor has the ALJ considered contextual factors or the fact that the issues discussed in the ad might relate to the primary election. Instead, the ALJ has focused on the ad itself, which expresses clear opposition to a specific unambiguously named individual and states unequivocally that "Weld County can't afford Mike Freeman as County Commissioner." While the ad does not contain an express exhortation to vote against Mike Freeman[6] and does not explicitly mention the upcoming primary election, it's language constitutes the functional equivalent of such an exhortation because it mentions Mike Freeman's name, associates that name with the position of County Commissioner, thereby indicating Freeman is a candidate for that position, and effectively urges voters to vote against Freeman for this position based on his prior alleged support for a tax increase by saying Weld County can't afford Freeman as a County Commissioner.

The League asserts the ad constitutes merely issue advertising meant to inform voters of Mike Freeman's position on taxes so that voters can form their own opinion as to whether or not to vote for him. The ALJ disagrees. The ad goes beyond mere education and information: it specifically tells voters that Freeman will be a commissioner that the County cannot afford. Contrary to the ads addressed in *Wisconsin Right to Life*, the League's flyer lacks substantial indicia of an issue ad: while it addresses a legislative issue, it does not exhort the public to take a position on that issue or contact public officials concerning the issue. Additionally, unlike *the Wisconsin Right to Life* ads, the League's flyer contains indicia of express advocacy in that it unambiguously mentions a candidate, Freeman, by name, refers generally to the election/candidacy by referencing the office of County Commissioner, and takes a position on a Freeman's character, qualifications, or fitness for office by explicitly stating Weld County cannot afford Freeman as County Commissioner. Therefore, the League's flyer was the functional equivalent of express advocacy and was subject to regulation under Article XXVIII, Section 6(1) and CPF Rule 9.

---

[6] The ALJ has previously ruled in Case No. OS 2008-0019, Agency Decision dated August 28, 2008, that the ad does not meet the express advocacy test and therefore is not regulated under Colo. Const., Art. XXVIII, Sections 5(1) and (2) as an independent expenditure. *See also infra,* Section III.A.

D.

Pursuant to Article XXVIII, Section 6(1) and CPF 9.2, the League, as a "person" expending more than $1,000 in a calendar year on electioneering communications, was required to file an electioneering report with the Secretary of State in accordance with the schedule set forth in Section 1-45-108(2). This schedule required the League to file its report of its July 23, 2008 spending by August 4, 2008. The League had not done so as of the August 13, 2008 hearing and thus was in violation of Article XXVIII, Section 6(1).[7]

II.

Simpson next asserts that in connection with the flyer the League, a corporation, violated Article XXVIII, Section 6(2) by providing funding for an electioneering communication, without establishing a political committee for that purpose. The ALJ agrees.

Section 6(2) provides:

> Notwithstanding any section to the contrary, it shall be unlawful for a corporation or labor organization to provide funding for an electioneering communication; except that any political committee or small donor committee established by such corporation or labor organization may provide funding for an electioneering communication.

However, CPF 4.12 limits the reach of the Section 6(2) prohibition as follows:

> Article XXVIII, Section 6(2), concerning the prohibition against funding by corporations and labor organizations for electioneering communications, shall not apply to any corporation that:
>
> a. Was formed for the purpose of promoting political ideas and cannot engage in business activities;
>
> b. Has no shareholders with a claim on its assets or other income; and

[7] CPF 9.5.1 provides an exception to the electioneering communication filing requirement for certain entities that have otherwise filed disclosure reports "as long as any expenditure or spending subject to section 6, Article XXVIII and rule 9.4 is identified as an electioneering communication" on the disclosure form. The League's only filing with the Secretary of State, its August 8, 2008 Independent Expenditure report, did not include this identifying information and thus did not qualify as an acceptable substitute for an electioneering communication filing in accordance with this provision.

> c. Was not established by, and does not accept contributions from business corporations or labor organizations.

Thus, a corporation that meets the criteria contained in CPF 4.12 may use its general funds to make electioneering communication despite the prohibition of Section 6(2). *See Colorado Right to Life Committee, Inc. v. Coffman,* 498 F.3d 1137 (10th Cir. 2007) (*CRLC*). However, all other corporations are prohibited from providing funding for electioneering communications unless they establish a political committee or small donor committee for that purpose.

The League falls within the prohibition of Section 6(2) because it is a corporation that provided funding for an electioneering communication, in the form of the Mike Freeman flyer. Additionally, the evidence established that the League has not formed a political committee and there was no assertion that the League has established a small donor committee. Although CPF 4.12 provides an exemption for certain ideological corporations, the elements necessary to establish the League fits within that exemption have not been established in this case. Because the factual elements of the exemption are in the nature of an affirmative defense, the League bears the burden of proof to establish it falls within the exemption. *Farmers Insurance Exchange v. Taylor*, 45 P.3d 759 (Colo. App. 2001). At hearing, the League offered essentially no evidence in support of any assertion that it fits within the exemption and, in fact, did not explicitly raise CPF 4.12 as a defense at all. The sole information in the evidentiary record addressing the organizational nature of the League is that it is a non-profit corporation and that it has sent direct mail of an undisclosed nature to voters in connection with approximately three prior elections. There is no evidence, for example, as to the purpose for which the League was formed or whether it was established by or accepts contributions from business corporations or labor organizations. Under these circumstances, no factual basis exists to determine that the League is the type of organization that should be exempt from the regulatory provisions of Section 6(2).[8] Consequently, on the basis of the existing record, the ALJ concludes the League, as a

[8] The limitation reflected in CPF 4.12 is consistent in general with *FEC v. Massachusetts Citizens for Life,* 479 U.S. 238, 259-60 (1986). Based on First Amendment considerations, *MCFL* requires an exemption from various campaign finance regulations for certain voluntary ideological corporations that seek to engage in political speech (the *MCFL* exemption). However, as determined in *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d 1146-1151, the CPF 4.12 limitation is not co-extensive with the *MCFL* exemption. As a result, the Court in *CRLC* upheld an as-applied challenge to Section 6(2), holding that Section 6(2) improperly infringed on CRLC's First Amendment rights by failing to exempt CRCL from its prohibition, as required by *MCFL*. In the present case, the League has failed to provide any factual basis either to establish that it is a CPF 4.12 organization exempt from Section 6(2) or that it is an organization similar to CRCL, to which Section 6(2), even as modified by CPF 4.12, cannot be constitutionally applied.

corporation, violated Section 6(2) by providing funding for the Mike Freeman flyer, an electioneering communication.

III.

Finally, Simpson asserts that because the League, in connection with the flyer, made expenditures in excess of $200 to support or oppose the nomination or election of a candidate, it is a political committee as defined in Article XXVIII, Section 2(12)(a) and thus was required to file reports of contributions and expenditures, in accordance with Sections 1-45-108(1) (as extended by Article XXVIII, Section 7) and 1-45-109(2) and CPF Rule 4. Simpson asserts, and it is not disputed, that the League failed to file such committee reports. For the reasons stated below, the ALJ concludes the evidence failed to establish the League is a political committee or was required to file reports of contributions and expenditures as a political committee. The ALJ therefore concludes no violation of these reporting requirements has been established.

A.

Section 1-45-108(1)(a)(I) provides:

> All candidate committees, political committees, issue committees, small donor committees, and political parties shall report to the appropriate officer their contributions received, including the name and address of each person who has contributed twenty dollars or more; expenditures made, and obligations entered into by the committee or party.

Additionally, Section 1-45-109 describes where those reports must be filed.

Simpson asserts that in connection with its spending on the Mike Freeman flyer, the League became a political committee, as defined in Article in Article XXVIII, Section 2(12)(a), and was thus required to file contribution and expenditure reports as provided by Sections 1-45-108(1)(a)(I) and 109. Section 2(12)(a) defines a political committee to mean:

> *any person*, other than a natural person, or any group of two or more persons, including natural persons that have accepted or *made* contributions or *expenditures in excess of $200* to support or oppose the nomination or election of one or more candidates.

[Emphasis supplied].

It is uncontested that as a corporation the League is a "person" under Article XXVIII and that the League has spent over $200 in connection with the Mike Freeman flyer. However, in order to fall within the Article XXVIII definition of a political committee, the League's actions with respect to the flyer must have amounted to an "expenditure."

"Expenditure" is a term of art in Article XXVIII. Section 2(8)(a) of Colo. Const., Art. XXVIII defines "expenditure" as:

> any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person *for the purpose of expressly advocating the election or defeat of a candidate* or supporting or opposing a ballot issue or ballot question. An expenditure is made when the actual spending occurs or when there is a contractual agreement requiring such spending and the amount is determined.

[Emphasis supplied].

Thus, in order to establish the expenditure element, Simpson was required to prove the League's spending on the flyer was for the purpose of expressly advocating the election or defeat of a candidate. The ALJ has previously determined in prior litigation between these parties (Case No. OS 20080019, Agency Decision, August 28, 2008) that the flyer in this matter does not amount to express advocacy of the election or defeat of a candidate. That determination remains unchanged in this proceeding.

As noted in the prior Agency Decision and above, the U.S. Supreme Court in *Buckley* has held that express advocacy occurs only when certain specific words are used, such as "vote for," "elect," "support," "cast your ballot for," "vote against," "defeat," and "reject." 424 U.S. 1, 44 and n. 52. *See also MCFL,* 479 U.S. at 249 (1986).

As set forth in the OS 20080019 Agency Decision, Colorado appellate courts have defined express advocacy in a manner similar to *Buckley* and *MCFL.* For example, in *League of Women Voters of Colorado v. Davidson,* 23 P.3d at 1277, the Colorado Court of Appeals interpreted the Fair Campaign Practices Act to mean that expenditures used for communications may be regulated only if the "actual words" of a political advertisement "expressly advocate" the election or defeat of an identified candidate. Such an approach permits regulation of communications that utilize words similar to those mentioned in *Buckley*, but does not limit the scope of permissible regulation solely to those communications that contain the precise words enumerated in *Buckley.* By taking this approach, the Colorado Court of Appeals sought to "strike an appropriate balance between trying to preserve the goals of campaign finance reform and, at the same time, protect political speech." *LWV,* 23 P.3d at 1277.

Nevertheless, even with the somewhat expanded interpretation of *LWV,* regulation relating to "expenditures" is still limited under Colorado campaign finance provisions to

communications that contain both of the factors defined in *Buckley* to constitute the elements of express advocacy*:* exhortation of voters to take a specific action and identification of specific candidates. *See also Petition of Skruch v. Highlands Ranch Metropolitan Districts Nos. 3 and 4,* 107 P.3d 1140, 1143-44 (Colo. App. 2004). Furthermore, exhortation under *LWV* is still narrowly defined to include only explicit entreaties to take action with respect to an election. Thus, *LWV* found that advertisements merely describing candidates' positions without urging a vote for or against any particular candidate did not constitute express advocacy, even when certain candidates were identified by name and a photograph in the advertisement and this information was accompanied by the request, "Please make sure to Vote!" As explained in *LWV* at 1277-12*78,* such a communication fails to meet the express advocacy test because it "does not expressly ask voters to vote for the identified candidates and does not ask the voter to support the stated political positions or philosophies and vote accordingly."

The Mike Freeman advertisement at issue in the present case similarly fails to meet the express advocacy test and therefore does not constitute an "expenditure" that would render the League a political committee as defined in Article XXVIII, Section (2)(8)(a). The flyer at issue here does not contain express advocacy words of any type: it does not urge voters to vote for or against Mike Freeman nor does it overtly urge voters to take any action at all. Thus, like the advertisement specifically discussed in *LWV*, the Mike Freeman flyer does not explicitly ask voters to vote for or against the candidate identified in the flyer and does not explicitly ask voters to support or reject the positions referenced in the flyer and vote accordingly.

Because the moneys paid in this case were not expended on a communication that expressly advocated the election or defeat of a candidate, such payment did not constitute an "expenditure" by the League of $200 or more to support or oppose the nomination or election of a candidate. Thus, the League's spending on the flyer did not automatically cause the League to become a political committee as defined in Article in Article XXVIII, Section 2(12)(a) and did not trigger the requirement to file contribution and expenditure reports as provided by Sections 1-45-108(1)(a)(I) and 1-45-109.[9] Accordingly, Simpson has failed to establish that any violation of the reporting requirements for political committees, as set forth in Sections 1-45-108(1) and 1-45-109(2) and CPF Rule 4, occurred in this case.[10]

---

[9] The ALJ notes that in accordance with *Buckley,* 424 U.S. at 79, *Colorado Right to Life Committee, Inc. v. Coffman,* 498 F.3d at 1152 and *Alliance for Colorado's Families v. Gilbert,* 172 P.3d 964, 970-972 (Colo. App. 2007), in order to comply with First Amendment protections, regulation of political committees under campaign finance laws must be limited to organizations whose major purpose is the nomination or election of a candidate. This additional, constitutionally-based, limitation is not included in Colorado's campaign finance law. However, because the League does not otherwise fall within the definition of a political committee under Article XXVIII, there is no need to address the affect of that omission in the context of this proceeding with respect to Simpson's political committee allegations.

[10] As referenced in the Agency Decision in OS 20080019, the definition of "expenditure" contained in

B.

Simpson contends that in the course of this proceeding and in OS 20080019, the League, through its representative in this proceeding, admitted the League made expenditures that were required to be reported and failed to report those expenditures. Simpson asserts these statements constituted binding judicial admissions that establish the League is a political committee and was required to, but did not, file disclosure statements pursuant to Sections 1-45-108 and 109. The ALJ finds this argument unpersuasive.

A judicial admission is a "formal, deliberate declaration that a party or his or her attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute." *Kempter v. Hurd*, 713 P.2d 1274, 1279 (Colo.1986). However, judicial admissions are limited to matters of fact and do not encompass matters of law or legal positions. *See Colorado State Board of Medical Examiners v. Ogin,* 56 P.3d 1233, 1240 (Colo. App. 2002). Additionally, they must be unequivocal. *Salazar v. American Sterilizer Co*., 5 P.3d 357 (Colo. App.2000).

Even assuming any such formal, unequivocal, deliberate declarations were made in this matter on behalf of the League, such statements related either to undisputed facts (*e.g.,* no political committee registration or disclosures were filed) or constituted legal conclusions (statements relating to whether the League made "expenditures" or was required to file a political committee contribution and expenditure report). The League is simply not bound by purported admissions of law regarding the nature of the League's spending or whether it is a political committee under Colorado's campaign finance laws because such statements of law cannot constitute judicial admissions.

Simpson also appears to argue that the fact of the League's statements and filings, even if not binding on the League, provides some evidence that the League's spending on the flyer constituted an expenditure of more than $200, thus rendering the League a political committee. However, the ALJ is not convinced that the League's statements and filings in this matter, in the context of a confusing and constantly evolving area of

---

Article XXVIII, Section 2(8)(a) of the Colorado Constitution is explicitly limited to communications that involve "express advocacy," in contrast to the provision of BCRA addressed in *McConnell* and *Wisconsin Right to Life.* Thus, in the context of Simpson's claim with respect to political committee reporting, the issue before the ALJ is limited to determining whether the League's flyer falls within the definition of express advocacy. This claim does not raise broad Constitutional questions concerning the permissible outer limits of regulation of political speech that is not express advocacy, nor does it address conduct that is the functional equivalent of express advocacy. Instead, Simpson's claim concerning political committee reporting requirements in this case merely addresses the narrower issue of whether the League's spending on the flyer amounted to an "expenditure" as defined by Article XXVIII. The ALJ has concluded that it did not.

the law, constitute any evidence of the actual legal status of League's spending or its organizational structure.

Thus, the ALJ concludes the League's statements and filings do not establish, or provide any supporting evidence, that the League was required to file disclosure statements pursuant to Sections 1-45-108 and 109. Therefore, for the purpose of this claim, Simpson was required to independently establish that the League made "expenditures" in connection with the flyer and was a political committee required to file contribution and expenditure disclosure statements. Simpson failed to meet that burden.

IV.

Simpson has established violations of Article XXVIII, Section 6(1) (reporting required for electioneering communications spending in excess of $1,000 in a calendar year) and Article XXVIII, Section 6(2) (corporations and unions may not provide funding for electioneering communications unless they form a political committee or small donor committee for that purpose). He seeks the imposition of fines and penalties for these asserted violations and an award of attorney's fees.

A.

Articles XXVIII includes several provisions that relate to sanctions. Section 10(1) provides that any person who violates "any provision of this article relating to contribution or *voluntary* spending limits" is "subject to a civil penalty of at least double and up to five times the amount contributed, received, or spent in violation of the applicable provision of this article." [Emphasis supplied]. Because the proved violations in this case do not relate to contribution or voluntary spending limits, Section 10(1) is not applicable here.

Article XXVIII, Section 10(2)(a) provides that "the appropriate officer shall impose a penalty of fifty dollars per day for each day that a statement or other information required to be filed pursuant to section 5, section 6, or section 7 of this article, or sections 1-45-108, 1-45-109 or 1-45-110, C.R.S. . . . is not filed by the close of business on the day due."

Additionally, Article XXVIII, Section 9(2)(a) addresses hearings held before administrative law judges on complaints made to the Secretary of State. It provides: "if the administrative law judge determines that such violation has occurred, such decision shall include any appropriate order, sanction, or relief authorized by this article."

The evidence established that the League's electioneering communication disclosure, as required by Section 6(1) and Section 1-45-108, was due on August 4, 2008, and had not been filed as of the August 13, 2008 hearing, a period of nine days.

It is appropriate to impose a civil penalty of $450 for this violation, representing a civil penalty of $50 per day.

No specific sanction is included in Article XXVIII for a violation of Section 6(2). Because the ALJ concludes the violation was inadvertent and potentially involves constitutional issues (although the elements of an affirmative defense to this claim were not established), the ALJ concludes a limited civil penalty for this violation is appropriate. Therefore, an additional civil penalty of $200 is imposed for this violation.

B.

Simpson seeks imposition of attorney's fees against the League. As applicable here, Section 1-45-111.5, C.R.S., which was amended by H.B. 08-1041 on April 10, 2008, provides:

> (2) A party in any action brought to enforce the provisions of article XXVIII of the state constitution or of this article shall be entitled to the recovery of the party's reasonable attorney fees and costs from any attorney or party who has brought or defended the action, either in whole or in part, upon a determination by the office of administrative courts that the action, or any part thereof, lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Colorado rules of civil procedure. Notwithstanding any other provisions of this subsection (2), no attorney fees may be awarded under this subsection (2) unless the court or administrative law judge, as applicable, has first considered the provisions of section 13-17-102(5) and (6). C.R.S. For purposes of this subsection (2), "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

As provided by Section 13-17-102, C.R.S.:

> (5) No attorney fees shall be assessed if, after filing suit, a voluntary dismissal is filed as to any claim or action within a reasonable time after the attorney or party filing the dismissal knew, or reasonably should have known, that he would not prevail on said claim or action.

> (6) No party who is appearing without an attorney shall be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious; except that this subsection (6) shall not apply to situations in which an attorney licensed to practice law in this state is appearing without an attorney, in which case, he shall be held to the standards established for attorneys elsewhere in this article.

In the present case, based on the provisions of Sections 1-45-111.5.2(5) and 13-17-102(6), the ALJ finds that an award of attorney fees is not warranted. The League was represented in this proceeding by a non-attorney pursuant to Section 13-1-127(2), C.R.S. (2008). The ALJ has found that the evidence did not establish that the League clearly knew or reasonably should have known that its defense or any part thereof was substantially frivolous, substantially groundless or substantially vexatious. As indicated, the League had previously prevailed in a hearing before the undersigned ALJ in Case No OS 20080019, involving the same complainant, the same flyer, and a related legal theory. Further, the issues in this proceeding involved an area of law that is exceedingly complex and in a state of flux. Under these circumstances the ALJ cannot say that the League clearly knew or reasonably should have known that any part of its defense was substantially frivolous, substantially groundless, or substantially vexatious. Consequently, in accordance with the sections cited above, an award of attorney's fees is not appropriate.

CONCLUSIONS OF LAW

1. The ALJ has jurisdiction over this matter. Colo. Const. Art. XXVIII, Section (9)(2)(a).

2. The League violated Colo. Const., Art. XXVIII, Sections 6(1) and (2), as charged in the complaint. The evidence did not establish the League is a political committee that was required to file disclosures pursuant to Sections 1-45-108 (as extended by Colo. Const., Art. XXVIII, Section 7) and 1-45-109.

AGENCY DECISION

The League violated Colo. Const., Art. XXVIII, Sections 6(1) and (2), as charged in the complaint, in connection with the flyer at issue in this case. The League is ordered to pay a civil penalty to the Secretary of State within 30 days of the date of this Agency Decision in the amount of $450 in connection with its violation of Section 6(1) and an additional civil penalty of $200 in connection with its violation of Section 6(2).

No attorney's fees are imposed with respect to either party.

This Agency Decision is subject to review by the Colorado Court of Appeals pursuant to Section 24-4-106(11), C.R.S. and Colo. Const. Art. XXVIII, Section 9(2)(a).

DONE AND SIGNED
September ____, 2008

JUDITH F. SCHULMAN
Administrative Law Judge

Courtroom 2, digital recording
Complainant's Exhibits A-G, J

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above **AGENCY DECISION** was sent by U.S mail, postage prepaid and to:

Scott Shires
Colorado League of Taxpayers
Campaign Compliance Center
12237 East Amherst Circle
Aurora, CO 80014

Colorado League of Taxpayers
2205 Larimer Street
Denver, CO 80205

Adele L. Reester, Esq.
Bernard, Lyons, Gaddis & Kahn, PC
P.O. Box 978
Longmont, CO 80502-0978

and to:

William A. Hobbs
Deputy Secretary of State
Department of State
1700 Broadway, Suite 270
Denver, CO 80290

on this ___ day of September, 2008.

_____
Office of Administrative Courts